In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-66

SCHOLLE CHEMICAL CORPORATION, ET AL.

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7)[1] is not yet reported. The decision and order of the Board (Pet. App. 11-17) are reported at 192 NLRB No. 101.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8-9) was entered on February 9, 1973, and on April 12, 1973, the court denied petitioners' timely petition for rehearing (Pet. App. 10). The petition for a writ of certiorari was filed on July 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that non-employee union organizers were entitled

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[1] "Pet. App." refers to the separate printed Appendix filed with the petition for a writ of certiorari. "A." refers to the larger one volume Appendix in the court of appeals.

to access to company property because, in the circumstances of this case, there were no other effective means of communicating with the employees.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

A. The Board's Finding of Fact

The Scholle plant is located within an industrial tract in the Chicago suburb of Northlake, Illinois, close to the intersection of North Avenue and Railroad Avenue. A diagram illustrating this tract is set forth at Pet. App. 16. Briefly, North Avenue is a major 4-lane State thoroughfare with a posted speed limit of 40 miles per hour and an average traffic load in both directions of about 38,000 vehicles per day. Railroad Avenue is a private access road from North Avenue running through the Industrial Park. It is owned by the Automatic Electric Company—the principal occupant of the industrial tract—but Scholle has an easement for its use (A. 28). Because of surrounding buildings, railroad tracks, and other properties, the Scholle plant is accessible only from Railroad Avenue, which has exits into parking lots in the front and on both sides, of the plant (Pet. App. 21-22).

Automatic Electric, the primary user of Railroad Avenue, employs about 11,000 employees. About 40 per cent of Automatic Electric's employees (about 4,400 employees) use Railroad Avenue in entering or leaving Automatic Electric's parking lots (Pet. App. 22).[2]

[2] Its remaining employees enter or exit from Wolf Road, a public road east of the Automatic Electric plant and parallel with Railroad Avenue (Pet. App. 22).

Scholle employs about 350 people, of whom about 27 per cent live in Northlake, 58 per cent live in other Chicago suburbs, and 15 per cent live in Chicago. Scholle employees on all shifts report to and leave work in the stream of Automatic Electric employees, who also use Railroad Avenue. Neither Automatic Electric nor Scholle employees have any form of identification on their cars to distinguish one from the other (Pet. App. 22-23, 26).

On October 31, 1969, at the invitation of two employees of Scholle, Tony Hall, an international representative of the Oil Chemical and Atomic Workers International, AFL-CIO (the "Union") and another Union representative, Frank Ryan, came to the Scholle plant about 3 p.m. Hall stood near the plant's main entrance in the small area directly in front of the building (see diagram, Pet. App. 16), while Ryan stood at the entrance to the North parking lot. They spoke with Scholle employees and distributed envelopes containing a handbill and authorization card. About 5 or 10 minutes later, representatives of Scholle, after some preliminary conversation, advised Hall that Railroad Avenue was a private road and that distribution of literature was prohibited on it. In response to Hall's stated doubt, one of the representatives, a part-time officer in the Northlake Police Department, showed Hall his police badge, and required Hall and Ryan to leave. After assessing the feasibility of distributing handbills from the 50-foot strip of unpaved State property at the Northwest intersection of North and Railroad Avenues, Hall and Ryan concluded that, because of the heavy traffic on Railroad Avenue and the impossibility of telling which of the cars passing contained Scholle employees, further handbilling would not be productive (Pet. App. 23-24).

On November 6, 1969, Hall met again with his two employee contacts, reported his lack of success, and

asked them about arranging a meeting with other employees and about obtaining a mailing list. One of the employees suggested that Hall come to the plant early on Veteran's Day, when Company officials might not be around. Hall agreed, and from 6:30 to 7:30 a.m. on Veteran's Day he stood near the plant entrance and handed out about 120 handbills. Two days later Hall again met his employee contacts, who brought him an old Christmas mailing list. The list, however, was out of date, and contained mainly supervisors' addresses (Pet. App. 24).

On November 21, Hall sent Scholle a letter requesting access to the plant entrances for distribution of leaflets. On December 2, Scholle responded, asking Hall to refrain from using the private road for distribution, and pointing out that "traffic conditions are intense on this road during the hours of change of shift." The Company also noted that, in the past, organizers and picketers had respected the private ownership of the road (Railroad Avenue) and had remained on the public property of North Avenue.[3] It offered further assistance or information if needed. On January 12, 1970, Hall again wrote Scholle, asking it to supply the Union with a list of names and addresses of all current hourly employees. No reply was ever received. (Pet. App. 24-25.)

Meanwhile, on December 5, 1969, Hall, who had obtained 12 authorization cards from the employees, sent letters to each of the card signers telling them that he had filed charges with the Board and that he would be phoning soon in order to arrange to meet them. Although he thereafter called each of the card signers, he was never able to see any of them except his two original contacts. (Pet. App. 25.)[4]

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[3] Service and charitable organizations have utilized the intersection of North and Railroad Avenues to sell articles to and solicit contributions from passing motorists (Pet. App. 26-27).

[4] Hall testified that they said they were afraid to meet with him (A. 74-75).

On January 28, 1970, Hall sent a letter to about 40 employees asking them for help in compiling a mailing list of employees, and enclosing an authorization card and a self-addressed envelope. On February 12, February 24, and March 30, Hall sent additional letters enclosing authorization cards and asking for names and addresses for his mailing list (Pet. App. 25-26).[5]

On April 12, 1970, Hall, having been informed that Automatic Electric was on strike, reasoned that, because of the reduced traffic on Railroad Avenue, he might be able to reach the Scholle employees; so once again he attempted to handbill Scholle's employees. But, although Hall stood on the public area at the intersection of North and Railroad Avenues, trying both the east and west sides of Railroad Avenue for over two hours, he was unable to get anyone to stop or accept a handbill. (A. 360; 79.) Again the next morning at the same spot, Hall tried to reach Scholle employees. However, out of the hundreds of cars passing by he was able to get only 5 handbills accepted. (Pet. App. 25.)[6]

Scholle has a rule prohibiting employee solicitation within the plant and on its property. Thus, Hall was unable to get any Scholle employees to undertake any distribution of union handbills either inside the plant or in the parking lots (Pet. App. 27).

B. The Decisions Below

The Board found that Scholle violated Section 8(a)(1) of the Act by refusing to permit non-employee

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[5] While there was no evidence in the record demonstrating how Hall came into possession of the names and addresses of those to whom his letters were mailed, the Administrative Law Judge concluded that they probably came from the letter solicitations (Pet. App. 26).

[6] The cars are only accessible from public property when they are stopped for the traffic light, and them only the outside lane is accessible (A. 79-80).

union organizers to distribute leaflets and handbills and to solicit Scholle employees on Scholle property (Pet. App. 11-12, 38-39). In so concluding, the Board adopted the Administrative Law Judge's findings that there were no reasonable means of reaching the employees either at the entrance to the plant premises or away from their place of employment.[7] The Board ordered Scholle, *inter alia,* to cease and desist from prohibiting non-employee union organizers from distributing union literature, and from soliciting union membership, in its parking areas at points reasonably adjacent both to their entrances from Railroad Avenue and to plant entrances for employees (Pet. App. 12, 39-40.

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1-7).

ARGUMENT

In *National Labor Relations Board* v. *Babcock & Wilcox,* 351 U.S. 105, this Court held that, when non-employee union organizers wish to enter an employer's property to solicit employees, the Board must balance the organizational rights granted to the employees in Section 7 of the Act against the employer's property rights. Contrary to petitioners' assertion (Pet., pp. 9-10), this Court did not hold that the employer's property rights must yield only "in the unique case where no other means of communication is feasible." Rather, it held that the right to exclude from property must yield where "inaccessibility of [the] employees makes ineffective the reasonable attempts by non employees to communicate with them through the usual channels." (351 U.S. at 112.)[8] This Court recently

[7] Chairman Miller and Member Kennedy would have found that Scholle violated the Act by excluding the organizers from the Railroad Avenue property owned by Automatic Electric, rather than by excluding them from its own property (Pet. App. 13-17).

[8] No such conditions were found to exist in *Babcock*. For although solicitation at the plant gates was virtually impossible, the plant

reaffirmed the *Babcock* test in *Central Hardware Co. v. National Labor Relations Board,* 407 U.S. 539, 544. It also reaffirmed the principle that, where the Board has utilized the proper test, "[t]he determination whether on the record as a whole there is substantial evidence to support agency findings is a matter entrusted primarily to the courts of appeals" (407 U.S. at 548)

The court below found that substantial evidence supported the Board's finding that "because of the inaccessibility of the Scholle employees, reasonable attempts by non-employees to communicate with them through the usual channels were ineffective" (Pet. App. 6).[9] The facts set forth above, pp. 2-5, amply support the Board's finding. Thus, after its initial rebuff, the Union went to the plant on Veteran's Day, when Company officials were away, and succeeded in passing out some handbills.[10] It also obtained an old Christmas mailing list from the two original employee contacts, which proved to be useless since it was out of date and contained mainly supervisors' addresses. Thereafter, the Union tried on two occasions to distribute handbills

was "close to small, well-settled communities where a large percentage of the employees live" (351 U.S. at 113) and the usual methods of imparting information, such as mail, personal contact by telephone, on the streets, and in the employee homes, were available and had been utilized (351 U.S. at 107, n. 1, 112). The situation here, with employees scattered throughout the Chicago area and no accurate mailing list available after serious efforts to obtain one, was radically different.

[9] The court's conclusion that the Union made reasonable efforts which were "completely ineffective and non-productive" (Pet. App. 6) is not, as petitioners suggest (Pet., p. 12), an attempt to guarantee union success, but simply an application of the *Babcock* principle.

[10] Since Company officials, including one who exhibited a police badge, earlier accused union organizers of trespassing and escorted them off the property, the Company can hardly rely on the fact that the Union spent "barely over one hour at the plant site" to support its contention that the Union's campaign was "laggardly" (Pet., p. 12).

at the intersection of North Avenue and Railroad Avenue, but found this impracticable. The Union then attempted to compile a list of its own by repeated mailings to employees with requests for assistance in obtaining names and addresses, but succeeded in compiling only a partial list with an indeterminate number of incorrect names and addresses.[11] Finally, Union Representative Hall called the scattered employees and tried to arrange meetings with them, to no avail. In short, as the court below found, "[a]lthough reasonable efforts at communication were made by the union, the Scholle employees remained inaccessible" (Pet. App. 6).

The fact that this is the first case since *Babcock* to hold that an employer, other than a self-contained facility,[12] must permit non-employee organizers access to his property for the purposes of organizational activities does not detract from the substantiality of the evidence supporting the Board's findings that such an order was necessary here. Moreover, as the court of appeals held (Pet. App. 6-7), the cases relied upon by Scholle which prohibited on-site solicitation "are inapposite for in each instance feasible and effective methods of communication were available to the union organizers".

[11] The court below, in relying on Hall's uncertainty about the accuracy of the names and addresses he eventually obtained, did not shift the burden to the employer to prove the accuracy of the list, as petitioners contend (Pet., pp. 10-11). Rather, the court drew the logical conclusion that the Union did not have any reasonable means of communicating with the employees if all its efforts produced only a partial list which, under the circumstances, was of dubious value. In any event, the record reveals that some of the Union's mailings were in fact returned because of inaccurate addresses (Pet. App. 26; A. 101-102, 493-494).

[12] As petitioners point out (Pet., p. 9), there are several cases where access has been required because of the self-contained nature of the plant and the impossibility of reaching the employees away from the plant premises. See cases cited at Pet., p. 9. See also, *The Interlake Steamship Co.*, 174 NLRB 308, where the Board set aside an election and directed a new one because

The decision below is not a departure from this Court's decisions in *Babcock* or *Central Hardware*, both of which were relied on by the court below and discussed accurately by it (see Pet. App. 5-6). The matter before the court of appeals was a factual one—whether substantial evidence supported the Board's findings that the inaccessiblity of the employees made ineffective the reasonable attempts by non-employee union-organizers to communicate with them through the usual channels for such communication. The court below correctly concluded that substantial evidence supported the Board's findings. Since that is the only issue presented, and since resolution of that issue turns on the particular facts of this case, further review by this Court is nor warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.

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the employer's refusal to permit nonemployee organizers on its property limited the organizational campaign to such an extent that it rendered a fair election impossible.